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USA: Federal court rejects government's invocation of 'state secrets privilege' in CIA 'rendition' cases

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According to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law. We reject this... Separation-of-powers concerns take on an especially important role in the context of secret Executive conduct

US Court of Appeals for the Ninth Circuit, 28 April 2009

Under international law, victims of human rights violations have the right to remedy and redress. This must not only be available in law, but accessible and effective in practice. Any invocation or exploitation of state secrecy, which by design or effect would prevent this right from being realized, must be precluded. At the same time, governments have the duty under international law not only to prevent human rights violations in the first place, but to investigate them when they do occur, bringing to justice anyone responsible for such violations.

A ruling on 28 April 2009 by a US federal court is a welcome development in this regard. At the centre of the case before it was the US administration's bid to use a level of secrecy that would block any judicial scrutiny of the human rights violations in question – which in this case include torture and enforced disappearance, crimes under international law.

The case is *Mohamed v. Jeppesen Dataplan, Inc.*, involving five current or former detainees who filed a lawsuit in US District Court in the District of Northern California in 2007 against Jeppesen Dataplan, Inc. (Jeppesen). This subsidiary of the Boeing Company is alleged to have been involved in the "rendition" program operated by the USA, largely under the auspices of the Central Intelligence Agency (CIA).

The lawsuit alleged that Jeppesen had provided "direct and substantial services" to the CIA for the rendition program. In so doing, the lawsuit continued, "Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine".

The Bush administration moved to intervene in the case, to assert "state secrets privilege" on behalf of itself and Jeppesen, and to have the case dismissed on that basis. Under US constitutional law, the government may assert state secrets privilege when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged". The invocation of the state secrets privilege is a categorical bar to a lawsuit if its very subject matter is a state secret. The Bush administration asserted that the subject matter of this lawsuit was. In support of this assertion, the then Director of the CIA filed a declaration with the District Court that proceeding with the case would cause "exponentially grave damage" to national security by revealing CIA methods and sources and "extremely grave damage" to the USA's foreign relations and activities by revealing which governments the CIA had cooperated with.

In February 2008, the District Court ruled in favour of the government. The judge said that a review of the CIA Director's public and classified declaration raised concern that "any further proceedings in this case would elicit facts which might tend to confirm or refute as of yet undisclosed state secrets". He

noted that at the core of the case against Jeppeson were "allegations" of covert US operations outside the USA against foreign nationals which he said was "clearly a subject matter which is a state secret". He dismissed the case.

The decision was appealed to the US Court of Appeals for the Ninth Circuit, and two and half weeks after the inauguration of President Barack Obama, a hearing was held before a three-judge panel. Asked by the court whether the new administration would be adopting a different stance on the case than its predecessor, the Justice Department lawyer replied that it would not.

On 28 April 2009, the three judges issued their unanimous opinion, rejecting the administration's position. The subject matter of the lawsuit "is not a state secret", the Ninth Circuit wrote, "and the case should not have been dismissed at the outset". It said:

> "At base, the government argues here that state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official. The district court agreed, dismissing the case exclusively because it 'involves 'allegations' about [secret] conduct by the CIA.' This sweeping characterization of the 'very subject matter' bar has no logical limit – it would apply equally to suits by US citizens, not just foreign nationals; and to secret conduct committed on US soil, not just abroad. According to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law."

The Ninth Circuit panel rejected this interpretation of the "very subject matter" concept. It said that the 1953 US Supreme Court decision *United States v. Reynolds* prevented the provision of secret evidence to the plaintiff only when disclosure would threaten national security. The Ninth Circuit said that "within the *Reynolds*'s framework, the President's interest in keeping state secrets *secret* is, of course, still protected". Secret evidence, the Ninth Circuit said, should be cut out from the evidence disclosed on an "item-by-item basis, rather than by foreclosing litigation altogether at the outset".

The Ninth Circuit ruled that "separation-of-powers concerns take on an especially important role in the context of secret Executive conduct", adding that arbitrary detention and torture "under any circumstance" represents a "gross and notorious… act of despotism". The *Reynolds* framework, the opinion continued, "accommodates these division-of-powers concerns by upholding the President's secrecy interests without categorically immunizing the CIA or its partners from judicial scrutiny".

The government had also argued that evidence is "secret" within the meaning of the state secrets privilege when it contains any "classified" information. The Ninth Circuit rejected this as well:

> "If the simple fact that information is classified were enough to bring evidence containing that information within the scope of the privilege, then the entire state secrets inquiry – from determining which matters are secret to which disclosures pose a threat to national security – would fall exclusively to the Executive Branch…
>
> A rule that categorically equates 'classified' matters with 'secret' matters would, for example, perversely encourage the President to classify politically embarrassing information simply to place it beyond the reach of judicial process".

The courts, the Ninth Circuit panel continued, must undertake an independent evaluation of any evidence the government was seeking to have excluded from disclosure, in order that the judiciary could determine whether it was secret within the meaning of the state secrets privilege. The Ninth Circuit sent the case back to the District Court with the following instruction:

> "On remand, the government must assert the privilege with respect to secret evidence (not classified information), and the district court must determine what evidence is privileged and whether any such evidence is indispensable either to plaintiffs' *prima facie* case or to a valid

> defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint."

While Amnesty International welcomes the Ninth Circuit panel's rejection of the government's bid to have the case thrown out of court, the organization recognizes that the ruling constitutes only the opening of a door. Without a new and rigorous government adherence to transparency, remedy and accountability, the door could yet prove to have been opened on to nothing more than thin air and protracted litigation.

Moreover, the Ninth Circuit's decision puts it at odds with one issued by the Fourth Circuit on 2 March 2007. In that ruling, the Fourth Circuit dismissed a lawsuit brought by Khaled el-Masri against employees of the CIA and named private companies in relation to his rendition from Macedonia to Afghanistan followed by arbitrary detention and ill-treatment in US custody. As had occurred in the Jeppesen case, a District Court had dismissed the lawsuit after the Bush administration invoked the state secrets privilege, claiming that continuation of the lawsuit posed an unreasonable risk that privileged state secrets would be disclosed. Unlike the Ninth Circuit, however, the Fourth Circuit upheld the District Court of Eastern Virginia's decision in the El-Masri case, rejecting the assertion by the plaintiff that the state secrets doctrine represented "a surrender of judicial control over access to the courts". Asked to intervene, the US Supreme Court declined and allowed the Fourth Circuit decision to stand and Khaled El-Masri to be denied access to remedy, in violation of international law.

Amnesty International urges the US administration not to appeal the Ninth Circuit ruling, whether to the full Ninth Circuit court or to the US Supreme Court. It should allow the lawsuit to proceed in the District Court, while ensuring that the position the administration adopts at all times ensures that the right to remedy and redress is effective as required by international law. The government should not invoke any right to state secrecy or exploit any use of classified information that might prevent a victim of torture or other ill-treatment, arbitrary detention, enforced disappearance, or other human rights violations from establishing the violation and obtaining an effective remedy.

Evidence has continued to mount of the human rights violations, including crimes under international law, that have been committed by the USA in the name of countering terrorism, including in the context of the CIA's use of rendition, secret detention, and "enhanced interrogation". Among this mounting evidence is the recently leaked February 2007 report of the International Committee of the Red Cross based on interviews it had with Guantánamo detainees previously held in CIA secret custody; the new administration's publication of previously secret US Justice Department memorandums giving legal clearance for the CIA to use interrogation techniques that violated the international prohibition of torture and other cruel, inhuman or degrading treatment; and a newly released report by the Senate Armed Services Committee on its inquiry into the treatment of detainees in US custody.

As well as facilitating remedy and accountability through a litigation strategy that puts respect for international human rights principles at its centre, the US administration should ensure that an independent commission of inquiry is set up to investigate all aspects of the USA's detention and interrogation policies and practices since 11 September 2001. If and when the inquiry concludes that particular conduct may have amounted to crimes under national or international law not known to be already under investigation, the information gathered should be referred to the appropriate federal authorities with a view to possible prosecution of the individual or individuals concerned. The establishment and operation of the commission, however, must not be used to block or delay the prosecution of any individuals against whom there is already sufficient evidence of wrongdoing.[1]

In this regard, every act potentially constituting a crime under international law should be subject to an investigation capable of leading to a criminal prosecution. Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who either knew or consciously disregarded information that indicated that subordinates were committing violations, yet

[1] See USA: Investigation, prosecution, remedy. Accountability for human rights violations in the 'war on terror', December 2008, http://www.amnesty.org/en/library/info/AMR51/151/2008/en

failed to take reasonable measures to prevent or report it, should also be included, as well as anyone who authorized or participated in the acts, including by knowingly providing assistance. Prosecutions should not be limited to members of the US forces, but also should include private contractors and foreign agents where evidence of criminal wrongdoing by such individuals is revealed.

Rejecting impunity is crucial not only for dealing with past human rights violations, but also for preventing recurrences. The new US administration must ensure that investigations and prosecutions in individual cases are initiated while simultaneously working to remove legal or practical obstacles to criminal responsibility.

Background Information

The five plaintiffs in the Jeppesen lawsuit seeking damages for the human rights violations they say they were subjected to in the CIA rendition program are:

- Binyam Mohamed, a UK resident who was arrested in 2002 in Karachi, Pakistan, and turned over to US custody. According to the complaint, he was held for four months in incommunicado detention in US custody before being transferred to Morocco where he was held for 18 months in secret detention and subjected to torture or other ill-treatment, including beatings, sleep deprivation, and cutting with a scalpel. In January 2004, he was flown to secret US custody in Kabul, Afghanistan, where he was allegedly subjected to further torture, before being transferred to Bagram, and thence in September 2004 to Guantánamo. He was released to the UK in February 2009.
- Abou Elkassim Britel, an Italian national who was working in Pakistan. According to the lawsuit, he was arrested in March 2002, spent two months in Pakistani custody before being handed over to the CIA and flown to Morocco, where he was held in secret custody for eight months and subjected to torture, beatings, sleep deprivation, and threats of sexual torture. He was released without charge in February 2003, but arrested by Moroccan authorities three months later, tried for terrorist-related activities and sentenced to 15 years in prison, reduced to nine years on appeal.
- Ahmed Agiza is an Egyptian national who was arrested in Sweden in December 2001, handed over to the CIA, and flown to Egypt where he was allegedly subjected to torture, including electric shocks and beatings. In 2004, he was tried by a military tribunal in Egypt and sentenced to 25 years for membership of a banned organization, reduced to 15 years on appeal.
- Muhammad Faraj Ahmed Bashmilah is a Yemeni national who was arrested in Jordan in 2003, handed over to the CIA and flown to Afghanistan where he was allegedly placed in solitary confinement in 24-hour-a-day darkness, and subjected to sleep deprivation and cruel use of shackles. After about six months, he was transferred to a US-run secret detention site at an undisclosed location. He was returned to Yemen in May 2005.
- Bisher al-Rawi is an Iraqi national and a UK permanent resident who was arrested in Gambia in November 2002, handed over to the CIA and flown to Afghanistan, where he was held in the 'Dark Prison' and Bagram before being transferred to Guantánamo. He has alleged that he was subjected to torture or other ill-treatment in US custody. He was released to the UK in March 2007.

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